Vet.App. No. 15-2817

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

RICHARD E. MCGINNIS,
Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

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ISSUE PRESENTED

Whether the Court should affirm the May 4, 2015, Board of Veterans' Appeals (Board or BVA) decision that denied a claim of entitlement to Department of Veterans Affairs (VA) disability benefits based on service connection for Parkinson's disease as due to herbicide exposure, where the Board's findings are supported by the record, they are not clear error, and they are adequately explained.

STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review final decisions of the BVA. 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

Richard E. McGinnis, hereinafter "Appellant," appeals a May 4, 2015, Board decision, wherein the BVA denied a claim of entitlement to VA disability benefits based on service connection for Parkinson's disease as due to herbicide exposure, to include Agent Orange.[1] (Record Before the Agency (R.) at 1-23).

C. STATEMENT OF FACTS

Appellant had active duty service from January 1964 to December 1966, and from June 1969 to June 1972, to include service in the Republic of Vietnam. (R. at 705, 706). In connection with his claim, Appellant's service treatment records were obtained and these records do not reveal a diagnosis of Parkinson's disease. (R. at 873-958).

In April 2011, Appellant filed a service-connection claim for Parkinson's disease. (R. at 986-93). Appellant submitted a statement in support of his claim in November 2011 asserting that he had Parkinson's disease from exposure to herbicides in Vietnam. (R. at 836).

The VA Regional Office (RO) issued a rating decision in February 2012

[1] Appellant has limited his appeal of the Board's decision to the above-mentioned claim. He is not contesting the Board's denial of entitlement to a compensable rating for bilateral hearing loss. Thus, Appellant has abandoned any appeal therefrom. *See Bucklinger v. Brown*, 5 Vet.App. 435 (1993). The May 2015 Board decision also remanded Appellant's claim of entitlement to service connection for cervical dystonia as due to herbicide exposure, to include Agent Orange. Therefore, this issue is not currently before this Court. *See* 38 U.S.C. § 7266(a); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (holding that a Board remand "does not represent a final decision over which this Court has jurisdiction.").

denying service connection for Parkinson's disease based on a lack of evidence demonstrating a current diagnosis. (R. at 826-32). Appellant submitted a notice of disagreement (NOD) in April 2012 indicating that he was being treated at the Parkinson's Clinic in Houston, Texas. (R. at 821-22).

In April 2012, Appellant also provided correspondence from Dr. Aliya I. Sarwar with VA's Parkinson's Disease Research, Education, and Clinical Center in Houston, Texas (PADRECC). (R. at 819); *see* (R. at 564 (564-67)). Dr. Sarwar stated that Appellant had a diagnosis of cervical dystonia and that Appellant had been followed by the PADRECC since November 2011. (R. at 819). He further stated that Appellant was being treated with botulinum toxin injections to his affected muscles. *Id.*

On behalf of Appellant, his representative submitted a statement in December 2012 noting that there is no diagnosis of Parkinson's disease, but cervical dystonia and that Appellant contends that the symptoms of cervical dystonia would support a diagnosis of Parkinson's disease. (R. at 812).

The RO issued a Statement of the Case (SOC) in January 2013 that continued to deny Appellant's claim. (R. at 791-811). A substantive appeal was filed later that month. (R. at 768). In his substantive appeal, Appellant indicated that "according to the Dystonia Medical Research Foundation, symptoms from Parkinson's and dystonia can occur in the same patient because both of these movements [sic] disorders seem to arise from involvement of the basal ganglia in

the brain." *Id.*

In connection with his claim, the RO obtained Appellant's VA treatment records, including those with the PADRECC. (R. at 24-124, 527-624). These records include a November 2011 neurology consult, which noted Appellant's report of experiencing neck pain, pulling, and head tremor following a bicycle-car accident in 2002. (R. at 571 (571-77)). The examining physician noted he had laterocollis, right torticollis, persistent head tremor, and left shoulder elevations. (R. at 573). After a neurological examination and reviewing cervical spine x-rays, Dr. Sarwar rendered a diagnosis of cervical dystonia with dystonic tremor, likely post traumatic. (R. at 575). Botulinum toxin injections were discussed and Appellant agreed to proceed at the next visit. (R. at 575). Subsequent records from the PADRECC from December 2011 to February 2015 consistently note his same symptoms and reflect a diagnosis of cervical dystonia. *See* (R. at 24-26 (February 2015), 44-47 (August 2014), 50-53 (April 2014), 73-75 (December 2013), 79-81 (August 2013), 93-96 (April 2013), 528-31 (November 2012), 532-35 (August 2012), 543-46 (July 2012), 564-67 (December 2011)).

In May 2015, the Board issued the decision on appeal. (R. at 1-23). In evaluating his service-connection claim for Parkinson's disease, the Board found that the most probative evidence of record did not show that Appellant had a diagnosis of Parkinson's disease, but rather cervical dystonia. (R. at 8-10). The Board acknowledged that Parkinson's disease and cervical dystonia are related

in both manifestation and etiology, but that they are distinct diagnoses. (R. at 17). The Board noted that his service-connection claim for Parkinson's encompassed his diagnoses of cervical dystonia since Appellant could not competently diagnose his condition and symptoms. (R. at 17). Ultimately, the Board denied service connection for Parkinson's disease and remanded a claim for cervical dystonia for a VA medical examination and opinion. (R. at 17-20). The Board also found that the Secretary satisfied his duty to assist. (R. at 8). Appellant appealed that decision to this Court.

SUMMARY OF THE ARGUMENT

The Court should affirm the May 4, 2015, Board decision denying entitlement to VA disability benefits based on service connection for Parkinson's disease. The Board set forth an adequate statement of reasons or bases for its determinations in denying his service-connection claim for Parkinson's disease after finding that the most probative evidence did not reflect a diagnosis of such a condition. Furthermore, any error on the part of the Board for a lack of discussion as to the need for a VA medical examination related to his service-connection claim for Parkinson's disease is harmless.

ARGUMENT

THE BOARD'S FINDINGS THAT APPELLANT IS NOT ENTITLED TO SERVICE CONNECTION FOR PARKINSON'S DISEASE ARE SUPPORTED BY AN ADEQUATE STATEMENT OF REASONS OR BASES AND ARE NOT CLEAR ERROR.

To establish service connection for a disability, a claimant must demonstrate "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated in service." *Shedden v. Principi*, 381 F.3d 1163, 1166–67 (Fed.Cir.2004). A finding concerning service connection is a finding of fact. *Wood v. Derwinski*, 1 Vet. App. 190, 192 (1991). The Court reviews the BVA's factual findings only to determine whether they are "clearly erroneous." *See* 38 U.S.C. § 7261(a)(4); *Gilbert v. Derwinski*, 1 Vet. App. 49, 52-53 (1990). Thus, if there is a plausible basis for the Board's findings in the instant case, those findings must stand. The Board is required to provide a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection

of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995).

Appellant argues that the Board failed to provide an adequate statement of reasons or bases as to the Secretary's duty to assist under 38 U.S.C. § 5103A(d)(2) by failing to discuss whether a VA medical examination was required to determine whether he has Parkinson's disease. Appellant's Brief (A.B.) at 4-7.

A medical examination must be provided only when there is, *inter alia*, competent evidence of a current disability or persistent or recurrent symptoms thereof. 38 U.S.C. § 5103A(d)(2)(A); *see also McLendon v. Nicholson*, 20 Vet.App. 79, 81–86 (2006) (discussing Secretary's duty to provide a medical examination). In its May 2015 decision, the Board addressed the merits of Appellant's claim and determined that the most probative evidence did not reflect a diagnosis of Parkinson's disease. (R. at 8-10). Specifically, the Board acknowledged that Appellant "suffers from symptoms such as persistent head tremors, left lateral laterocollis, right torticollis, mild anterocollis, and axial shifts," and that these symptoms have explicitly been attributed to his diagnosed cervical dystonia. (R. at 9). The Board noted that Appellant actively receives treatments from PADRECC for his cervical dystonia and that these records do not reflect a diagnosis of Parkinson's disease, but affirmatively establish a diagnosis of cervical dystonia. (R. at 9). The Board also found that Appellant was not

competent to render a diagnosis of Parkinson's disease and that the most probative evidence on this claim comprised of his VA treatment records, including those from PADRECC. (R. at 9).

The Board noted Appellant's contention that Parkinson's and dystonia manifest similar symptoms. (R. at 9). In this regard, the Board acknowledged that Parkinson's disease and cervical dystonia are "related in both manifestation and etiology," but they are separate diagnoses. (R. at 17). Given the lack of evidence demonstrating a diagnosis, the Board properly denied entitlement to service connection for Parkinson's disease. *See Brammer v. Derwinski,* 3 Vet.App. 223, 225 (1992) (absent "proof of a present disability[,] there can be no valid claim"). This is plausible, based on the record, and it is a finding that Appellant does not raise any arguments related thereto in his brief. *See* (A.B.); *See Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant has the burden of demonstrating error), *aff'd per curiam,* 232 F.3d 908 (Fed.Cir.2000) (table). The Board also remanded a service-connection claim for cervical dystonia for further development, including a VA medical examination and opinion after noting that his claim for cervical dystonia was "part of his initial claim for the symptoms the Veteran mistakenly associated with Parkinson's." (R. at 17). *See Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009) (holding that a pro se claimant's request for benefits must "be considered a claim for any . . . disability that may reasonably be encompassed by several factors including: the claimant's

description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim"); *see also Clemmons v. West*, 12 Vet.App. 245, 247 (1999) (generally purporting that claims based on distinctly diagnosed conditions should be considered as separate and distinct claims for the purposes of VA benefits).

Here, because there was no competent evidence of a diagnosis of Parkinson's disease, the Secretary's duty to provide a medical examination related to this claim was not triggered. *McLendon*, 20 Vet.App. at 81. The Secretary concedes that the Board did not specifically discuss whether an examination was needed on this claim; however, any error on the part of the Board as to this lack of discussion is harmless. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders,* 556 U.S. 396, 409 (2009).

Appellant asserts that the Board was required to provide such a discussion because it found that Appellant had "persistent or recurrent symptoms of a disability in the form of head tremors, left laterocollis and right torticollis, mild antercollos and axial shifts" satisfying the first element under *McLendon.* (A.B. at 5). This argument by Appellant is misplaced.

Significantly, the Board specifically found that the record did not contain competent evidence of Parkinson's disease. (R. at 8-10). Furthermore, while the Board noted Appellant's persistent or recurrent symptoms, it found that those

symptoms were "explicitly attributed to the Veteran's cervical dystonia." (R. at 9). The Board properly noted that Appellant's cervical dystonia was its own distinct disability. *See* (R. at 8-10, 17-18). Moreover, the Board's findings are supported by the medical evidence of record. In particular Appellant's VA treatment records from the PADRECC note his symptoms of laterocollis, right torticollis, persistent head tremor, left shoulder elevations, mild antercollis, and mild axial shift, and they attribute these to a diagnosis of cervical dystonia with dystonic tremor. *See* (R. at 24-26, 44-47, 50-53, 73-75, 79-81, 93-96, 528-31, 532-35, 543-46, 564-67, 571-77). Additionally, in an April 2012 letter, Dr. Sarwar with PADRECC stated that Appellant had a diagnosis of cervical dystonia. (R. at 819). There is no clear error in the Board's determination that there is a lack of a current disability of Parkinson's disease.

Furthermore, the Board remanded Appellant's service-connection claim for cervical dystonia for him to be provided a medical examination and opinion related to his manifested symptoms. Thus, Appellant will be provided a VA medical examination related to the current diagnosis and the persistent and recurrent symptoms he exhibits, which is the precise form of relief Appellant requests in his brief. Notably, the Board stated that the service connection claim for cervical dystonia was part of his initial 2011 claim. Any error Appellant alleges in failing to discuss the need to provide an examination for his alleged Parkinson's disease is harmless error. In this regard, there is no evidence to

support this diagnosis and Appellant's encompassed service-connection claim for cervical dystonia was remanded to assess his head tremors, left laterocollis and right torticollis, mild antercollos and axial shifts. *See* 38 U.S.C. § 7261(b)(2); *Shinseki v. Sanders,* 556 U.S. at 409.

Appellant also fails to cite to any evidence that contradicts the Board's findings, rather he relies on mere speculation. (A.B. at 5-6). In particular, Appellant asserts that the medical records do not "state that he does not have Parkinson's disease." (A.B. at 6). This is simply an argument of semantics. While the medical records do not specifically state that he does not have Parkinson's disease, they affirmatively describe his symptoms and attribute them to cervical dystonia. *See* (R. at 24-26, 44-47, 50-53, 73-75, 79-81, 93-96, 528-31, 532-35, 543-46, 564-67, 571-77). In this vein, Appellant's symptoms of laterocollis, right torticollis, persistent head tremor, left shoulder elevations, mild antercollis, and mild axial shift have all been attributed by PADRECC, which presumably has substantial expertise with Parkinson's disease, to cervical dystonia. *See Id*. Additionally, there is no suggestion of such a diagnosis of Parkinson's disease in the record except for Appellant's own statements that were correctly deemed incompetent by the Board. (R. at 8). Appellant does not raise any argument related to this competence finding by the Board in his brief. *See* (A.B.).

Additionally, Appellant asserts that his treatment at PADRECC in and of

itself raises "circumstantial evidence that [Appellant's] symptoms could be related to Parkinson's disease." (A.B. at 6). This argument is misguided, as it is clear that PADRECC is treating Appellant solely for cervical dystonia. *See* (R. at 24-26, 44-47, 50-53, 73-75, 79-81, 93-96, 528-31, 532-35, 543-46, 564-67, 571-77, 819).

Appellant further relies on "circumstantial evidence" in the form of a statement from the Dystonia Medical Research Foundation that "symptoms of Parkinson's and dystonia can occur in the same patient, as both involve the same part of the brain." (A.B. at 6). This argument stems from a statement provided in Appellant's January 2013 substantive appeal. (R. at 768). The Board recognized the relationship between Parkinson's and dystonia in its decision, including that they both have similar symptoms and involve the same part of the brain, but found that the competent evidence did not support even the mere suggestion that Appellant has a diagnosis of Parkinson's disease. *See* (R. at 9, 17). Moreover, the statements Appellant relies on from the Dystonia Medical Research Foundation are generic and not sufficient to overcome the specific medical evidence in this case. *See Sacks v. West*, 11 Vet.App. 314, 317 (1998) (noting that treatise materials generally are not specific enough to show nexus); *see also Herlehy v. Brown*, 4 Vet.App. 122, 123 (1993) (noting that medical opinions directed at specific patients generally are more probative than medical treatises). The medical evidence in this case establishes that

Appellant's symptoms have been attributed solely to cervical dystonia by PADRECC.

The duty to furnish a medical examination is not automatic. *See McLendon*, 20 Vet.App. at 81. Rather, it applies only once there is, *inter alia*, competent evidence of a current disability or persistent or recurrent symptoms thereof. 38 U.S.C. § 5103A(d)(2)(A); *see also McLendon,* 20 Vet.App.at 81–86. It does not require a "fishing expedition" to substantiate an unsupported claim. *Gobber v. Derwinski*, 2 Vet.App. 470, 472 (1992). Here, the Board's determination that the competent evidence of record did not reflect a diagnosis of Parkinson's disease is not clearly erroneous and is supported by an adequate statement of reasons or bases. *Gilbert*, 1 Vet. App. at 52; *see generally Wensch v. Principi*, 15 Vet. App. 362, 367 (2001). Any error on the Board's part in failing to specifically discuss whether an examination was needed on this claim is harmless. *See Hickson*, *please do not use "supra"; see also Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (remand not warranted when it "would result in this Court's unnecessarily imposing additional burdens on the [Board and the Secretary] with no benefit flowing to the veteran").

CONCLUSION

In light of the foregoing, the Secretary urges the Court to affirm the Board's May 4, 2015, decision.

Respectfully submitted,

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